NO. 22623 A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM A. SPENCER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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FILED

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENT OF FACTS

Appellant [hereinafter referred to as "Spencer"], and co-defendants Herbert Lee Clark, William Watson, and Jimmie Martin were charged in Count One of a two-count indictment with conspiracy to conceal marihuana in violation of Title 21, United States Code, §176(a). Count Two charged Spencer alone with concealment of the same marihuana named in Count One. A jury trial was held before the Honorable Peirson M. Hall, United States District Judge. Spencer was found guilty on both counts, Clark and Watson were found guilty on Count One and a motion by

Martin for judgment of acquittal was granted [C. T. 2; R. T. 382-383, 633-634]. 1/ All defendants were sentenced to five years in prison. Spencer does not challenge the sufficiency of the evidence. The only question before this Court is whether the marihuana was seized as a result of an unreasonable search, in violation of the Fourth Amendment.

The shipment in question, consisting of a footlocker and a suitcase, was delivered to a United Air Lines air freight agent at the Los Angeles International Airport by two men in a car on February 23, 1967, at approximately 12:30 A. M. [R. T. 155-156]. The air freight agent weighed the shipment, filled out an air bill which listed the shipper's name and address and the consignee's name, and stated that the shipment was to be sent to the Chicago airport and held for the consignee [R. T. 157]. Subsequent testimony established that Spencer was one of the two men who delivered the shipment to United Air Lines. The two men prepaid the freight charges in cash [R. T. 158]. Another air freight agent for United Air Lines described the shipper to police officers and furnished a copy of the air bill to Sergeant Fred McKnight of the Los Angeles Police Department [R. T. 27-28]. The footlocker and suitcase were eventually brought by United Air Lines employees to the office of Robert Berklite, the senior management employee on duty [R. T. 72-73].

1/ "C. T." refers to Clerk's Transcript of Record.

"R. T." refers to Reporter's Transcript of Record.

The Los Angeles Police Department had received information from a reliable informant that marihuana was being shipped by air and rail freight in footlockers to Eastern cities, including Chicago [R. T. 46-48, 58]. A substantial quantity of marihuana had been seized as a result of this information [R. T. 48]. Sergeant McKnight prepared a police bulletin describing this practice, which contained a photograph of a footlocker [R. T. 58] and asked freight handlers to notify the police if they received suspicious shipments [R. T. 57-59, 60-61]. Copies of the bulletin were given to a Railway Express agent. The police did not distribute bulletins to air freight offices and had no discussions with United Air Lines personnel prior to the opening of Spencer's footlocker [R. T. 42-43, 59-60].

Berklite testified that the footlocker and suitcase were brought to his office after another employee had brought them to his attention [R. T. 78-79]. The employees may have taken note of this because of briefing sessions held by United Air Lines for its employees, discussing the police bulletin and distributing copies of it. Berklite wanted his staff to be aware of the possibility that the Company was shipping narcotics [R. T. 74-75]. There is no evidence of any police participation in these briefings. The footlocker was opened by Berklite pursuant to tariff regulations because it was too heavy to be household furnishings and was overweight [R. T. 44-45, 53-54]. Berklite testified that United was not directed to open footlockers by the police. They were opened as a part of United's business to inspect for tariff

regulation violations and narcotics, which were covered by regulations [R. T. 77].

Berklite had received a copy of the police bulletin in early February and had discovered a marihuana shipment one week prior to opening Spencer's footlocker [R. T. 73-74, 80]. Prior to receiving the police bulletin, it was not the practice to open footlockers, although shipments had been opened for inspection [R. T. 80-81].

Everyone agreed that the footlocker had been opened by United and marihuana discovered before the police were called by Berklite. Apparently, the trunk was opened around 1:00 A. M. Sergeant McKnight arrived at the airport between 1:30 and 2:00 A. M. and was joined by Agent Irving Swank of the Federal Bureau of Narcotics [R. T. 26, 32, 44-45, 79-82].

The footlocker and suitcase were resealed for shipment to Chicago on a United flight scheduled to arrive at 7:25 A. M. [R. T. 170-172]. Co-defendants Watson, Clark and Martin were arrested when they called for the shipment at the air freight terminal in Chicago on February 25, 1967 [R. T. 224-227].

Appellant's trial counsel conceded that the police bulletin did not tell United to open footlockers [R. T. 89] and the trial court found that there was probable cause to open the footlocker and United had a legal right to open same. The court also found that Berklite was not an agent of the police department and that the police did not authorize the opening of the footlocker or do anything other than ask to be notified.

Essentially the same issues as are presented here are before this Court in case number C. A. 22846, Clayton v. United States.

II

QUESTIONS PRESENTED

1. IS THE OPENING BY AIRLINE EMPLOYEES OF A FOOTLOCKER WHICH IS PART OF AN AIR FREIGHT SHIPMENT, WHEN NO POLICE OFFICERS ARE AWARE OF THE SEARCH, AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT?

2. ARE EXIGENT CIRCUMSTANCES PRESENT WHICH EXCUSED THE POLICE FROM OBTAINING A SEARCH WARRANT FOR A FOOTLOCKER PREVIOUSLY OPENED BY AIRLINE EMPLOYEES?

III

ARGUMENT

A. THE OPENING OF SPENCER'S FOOTLOCKER BY UNITED AIRLINES WAS A PRIVATE SEARCH AND THEREFORE NOT WITHIN THE FOURTH AMENDMENT, SINCE THERE WAS NO PARTICIPATION BY POLICE OFFICERS

Spencer concedes that his footlocker was opened by Robert Berklite, a United Airlines supervisor, shortly after the footlocker was deposited with United for shipment (Appellant's Brief, p. 5). United opened the footlocker in order to be certain that it was not being used as a vehicle for the shipment of marihuana. Berklite knew that tariff regulations permitted the inspection of suspicious shipments and he had received a copy of a police bulletin, which stated that marihuana was being shipped to Eastern cities in footlockers. He did not look at the bulletin before opening the shipment and did not notify the police until after he discovered marihuana.

In Hernandez v. United States, 353 F. 2d 624 (9th Cir. 1965), this Court upheld a search of luggage by an airport police officer. Airport employees had been asked to notify police if they observed persons with unusually heavy luggage bound for New York on first class tickets purchased without advance reservations. A ticket agent called Sergeant Butler of the Los Angeles Police Department after observing a person fitting the description. Sergeant Butler personally went to the storage area and searched the luggage.

Two other officers arrived and conducted a similar search and all concluded that the luggage contained marihuana. This Court held that the search was not unreasonable. In the present case, the airline employee, Berklite, did not notify police as requested. He conducted a search pursuant to tariff regulations before calling police. The search was independent of any police activity, since Sergeant McKnight, the first officer to arrive, was not even called until after the marihuana was discovered by the airline. The present case involves far less police action than this Court allowed in Hernandez. See also: Collozo v. United States, 370 F. 2d 316 (9th Cir. 1966).

The case of Gold v. United States, 378 F. 2d 588 (9th Cir. 1967), is also relevant on this question. There, Customs agents informed United Air Lines that they had reason to believe a shipment which Gold had said contained "electronic controls" had been inaccurately described. Although asked by the airline supervisor, the Customs agents refused to reveal what they suspected the true contents of the shipment to be. After the agents left the premises, the supervisor opened Gold's packages. This Court said:

> "We conclude that the initial search of the packages by the airline's employee was not a federal search, but was an independent investigation by the carrier for its own purposes. Unlike Corngold, here the agents did not request that the package be opened, and they were not present when it was opened. The agents had the same

right as any citizen to point out what they suspected to be a mislabeled shipping document, and they exercised no control over what followed. What did follow was the discretionary action of the airline's manager and was not so connected with government participation or influence as to be fairly characterized, as was the search in Corngold, as 'a federal search cast in the form of a carrier inspection.'

"While it might be expected that the carrier would not ignore the packages after being advised of the mislabeling by government agents who obviously had more than a citizen's interest in the shipment, the carrier had sufficient reasons of its own for pursuing the investigation. The manager testified that packages suspected of containing something other than what was described on the air waybill were sometimes opened so that the airline would know what was being carried on its airplanes, and so that it could assess proper charges. Despite the manager's inquiry, the government agents did not reveal what they suspected the true contents of the packages to be. His suspicions aroused, the manager had no way to determine whether the contents of the packages were fit for carriage

and properly classified except by opening them. This the carrier had the right to do under its tariffs."

378 F. 2d at 391.

In Gold, the case of Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966) was distinguished. It is apparent that the determinative factor in these cases is the degree of participation by police officers in the opening of the shipment. When the opening search is made by airline employees, this Court has held that the search is reasonable even though a police officer is present. Wolf Low v. United States, 391 F. 2d 61 (9th Cir. 1968). On the other hand, when the police are on the scene, urge the airline to open the shipment and actively assist the airline employees in the opening, the search is improper.

In the only case holding that an airline search was unlawful, this Court stressed the extensive participation by Customs agents in the opening of the shipment, and emphasized facts which supported a conclusion that the search was initiated and directed by these agents with the airline employees as passive spectators. Corngold v. United States, supra. Spencer states that United States v. Wilson, 392 F. 2d 979 (9th Cir. 1968), a per curiam decision, is controlling. The brief opinion in that case did not, however, discuss the facts. Moreover, Spencer concedes that the airline employee in Wilson called San Diego police before opening the footlocker and that it was actually opened by police officers (Appellant's Brief, p. 7). In the instant case, the footlocker was

opened by United on its own initiative, in the absence of any police officer and before the police were called.

This Court should also consider the reasonableness of the conduct of the police and United Air Lines in this case. Sergeant McKnight knew that marihuana was being shipped in footlockers. Since it is obviously impractical and virtually impossible to station policemen at every point in Los Angeles where a footlocker may be deposited for shipment, he prepared a bulletin on the subject and asked that the police be notified when suspicious shipments were found. As in Gold, there was no suggestion that United or any other carrier open a shipment. United was aware of the bulletin and knew that its facilities had been used for the shipment of marihuana a week earlier. Having this in mind, United's supervisor decided to open the footlocker in accordance with tariff regulations. No police officer suggested that he open it or was even aware of the opening until after the marihuana was discovered. This Court should hold that the opening of Spencer's footlocker was a private search. Private searches are not covered by the Fourth Amendment. Burdeau v. McDowell, 256 U.S. 465 (1921); Watson v. United States, 391 F.2d 927, 928 (5th Cir. 1968); United States v. McGuire, 381 F.2d 306, 312-314 (2nd Cir. 1967), cert. denied 389 U.S. 1053 (1967); Barnes v. United States, 373 F.2d 517, 518 (5th Cir. 1967); United States v. Goldberg, 330 F.2d 30, 35 (3rd Cir. 1964); United States v. Ashby, 245 F.2d 684, 686 (5th Cir. 1957).

B. EVEN IF A POLICE SEARCH TOOK PLACE IN LOS ANGELES WHEN THE POLICE ARRIVED AT THE AIRPORT, NO WARRANT WAS REQUIRED BECAUSE OF EXIGENT CIRCUMSTANCES

When Sergeant McKnight arrived at the airport, he was shown an opened footlocker containing the marihuana. Since the search had already taken place, it would seem obvious that no warrant was necessary in order to seize contraband which had already been discovered. McKnight's actions in viewing the contents of the opened footlocker were proper, since he saw what was effectively in "plain view". Gilbert v. United States, 366 F. 2d 923, 932 (9th Cir. 1966), cert. denied, 388 U. S. 922 (1967); Chapman v. United States, 346 F. 2d 383, 385-87 (9th Cir. 1965); Caldwell v. United States, 338 F. 2d 385, 388 (8th Cir. 1964).

This Court has held that an examination of the contents of a shipment which had already been opened by an airline is not a search at all within the constitutional meaning of that term. Wolf v. United States, supra, at 63.

Assuming that a search did take place, and that it was a police search, the failure to obtain a search warrant was excused by exigent circumstances. No police officer was aware of Spencer's footlocker and its contents until Berklite called Sergeant McKnight around 1:00 A. M. on February 23, 1967. McKnight and other officers arrived at the airport between 1:00 and 2:00 A. M. They interviewed airline employees, examined an airbill and began their investigation. Apparently they assumed that their first task

as law enforcement officers was to capture the shippers and consignees of the marihuana. They may have assumed that the consignee would be expecting the shipment to arrive in Chicago on the first available flight. They acted to prevent the contraband from falling into the hands of its intended recipients by removing all but one brick from each container and replacing them with ballast. The footlocker and the suitcase were then forwarded to Chicago and officers in that city were asked to arrest whoever arrived to claim the shipment at the airport. Hindsight now establishes that co-defendants Watson, Clark and Martin did not claim the trunk until the morning of February 25, 1967, two days after shipment. The officers, however, could reasonably assume that any delay would be fatal to the investigation. A search warrant would do more than attach a legal formalism to a fact they already knew, that the footlocker contained marihuana. In order to obtain a warrant, they would have to awaken a United States Commissioner (and under the prevailing practice in the Central District of California, an Assistant United States Attorney), send an officer to obtain the warrant and return to the airport to serve it on United Air Lines. It would have been difficult to complete the search warrant procedures in the middle of the night and place the shipment aboard the first available plane. Under these circumstances, the failure to obtain a warrant should be excused. See: United States v. Rabinowitz, 339 U.S. 56 (1960); Glavin v. United States, 396 F.2d 725, 728 (9th Cir. 1968); Gilbert v. United States, supra, at 932; Boyden v. United States, 363 F.2d 551, 554 (9th Cir. 1966);

Hernandez v. United States, supra; Cipres v. United States, 343 F. 2d 95, 98, n. 9 (9th Cir. 1965); United States v. Zimmerman, 326 F. 2d 1, 4 (7th Cir. 1963).

Whenever a court is asked to sustain a search without a warrant, the standard of reasonableness is very important. This Court would be very reluctant to uphold a middle-of-the-night search of a home without a warrant, regardless of the exigent circumstances. Examination of an opened footlocker, which is part of an air freight shipment labeled "household furnishings" and which is in airline custody, should be treated differently. The Fourth Amendment has, from its very inception, been aimed at the elimination of the former, but there is no good reason for extending it to the latter.

IV

CONCLUSION

For the reasons stated in the above argument, this case should be affirmed.

Respectfully submitted,

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